IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of case

Criminal Appeal No. 381 of 2003

1. Anup Singh alias Appu
   S/o Sachidanand
   R/o Ghamandpur, P.S. Kotdwar
   District Pauri-Garhwal.
2. Dippi alias Vilaschand
   S/o Sri Heeral Lal
   R/o Village Nandpur, P.S. Kotdwar
   District- Pauri-Garhwal
3. Deepu alias Deepak
   S/o Sri Udai Singh
   R/o Village Ghamandpur, P.S. Kotdwar
   District- Pauri-Garhwal …….Appellants

(In jail)

Versus

State of Uttaranchal ……Respondent

Shri Sandeep S. Tiwari, Shri G.S. Negi and Shri L.K. Tiwari, learned Counsel for the Appellants
Shri A. Rab assisted by Shri Nandan Arya, learned A.G.A. for the State.

Date of decision: 6th May, 2005

For the approval of:-

Hon'ble Mr. Justice Irshad Hussain
Hon'ble Mr. Justice Prafulla C. Pant

- Whether the order/judgment should be sent to the reporters for reporting? ( )

- Whether the reporters be allowed to see the judgment? (Yes)

Reserved

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Corum: Hon Mr. Justice Irshad Hussain
Hon. Mr. Justice Prafulla C. Pant

Per: Hon'ble Prafulla C. Pant, J.

This Criminal Appeal, preferred under Section 374 of Code of Criminal Procedure, 1973 (herein after for brevity Cr.P.C.), is directed against judgment and order dated 05.12.2003, passed in Sessions Trial No. 69 of 2001, by the then learned Sessions Judge, Pauri-Garhwal, whereby appellants Anup Singh alias Appu, Dippi alias Vilaschand and Deepu alias Deepak are convicted under Section 302 read with Section 34 of Indian Penal Code, 1860 (herein after for brevity I.P.C.) and each one of them is sentenced to life imprisonment and fine of Rs. 5,000/-

in default of payment of which convicts were further directed to undergo six months simple imprisonment.

2. In brief, prosecution story is that 12.09.2001 at about 2:35 P.M., a First Information Report (Exh. A-1) was lodged with the Police Station Kotdwar by Dabbal Singh Negi (P.W. 1), father of the deceased, stating that at 2:00 P.M. on said date, his son Rishi Mohan (deceased) was going from his house towards Durgapur crossing when on the way, near the house of Maheshanand Bhatt, appellant Anup Singh alias Appu, Dippi alias Vilaschand and Deepu alias Deepak, attacked the deceased with 'KHUKARI' (sharp-edged weapon) and committed his murder. The incident was witnessed by Sarvendra Singh Rawat (P.W. 2), Bhagat Singh Rawat (P.W. 5) and others. The F.I.R. was lodged almost within half-an-hour of the incident and distance between the Police Station and the place of incident is said to be six Kms. Police registered crime No. 1029 of 2001 under Section 302 of I.P.C., against all the three accused and prepared a check report (Exh. A-12). An entry was made at serial No. 35 in the General Diary (copy extract Exh. A-13) at 14:35 hrs, regarding lodging of the F.I.R. The In-charge Inspector Nanke Singh Janwar (P.W. 7), took the dead body in possession on 12.09.2001 itself and prepared inquest report (Exh A-3). He further prepared police form No. 13 (Exh. A-5), diagram of the dead body (Exh. A-6), sample seal (Exh. A-7) and letter (Exh. A-4) to the Chief Medical Officer, requesting for post-mortem examination.

3. Post-mortem examination was conducted by Dr. Pradeep Kumar (P.W. 3) on 13.09.2001 on the dead body of the deceased brought by Constable Vijendra Singh and

Constable Krishan Gopal. Doctor who conducted the autopsy and prepared the post-mortem report (Exh. A-2), observed in his report that the dead body was of an average built person, aged 26 years. Rigour mortis was present. Both eyes were closed. Mouth open. Teeth 16/16. The Medical Officer further observed following ante-mortem injuries at the time of autopsy:-

1. **Incised wound 8cm x 1.5cm x skull bone cut deep on the right side of the head 9cm above ear. Fracture of parietal bone**
2. **Incised wound 12cm x 2.5cm on the back of right side of head, skull bone and brain deep. Fracture of occipital bone.**
3. **Incised wound 5cm x 1.5cm x skull bone deep on the head. Parietal bone was found fractured and cut.**
4. **Incised wound 7cm x 1.5cm x skull bone deep. Fracture in parietal bone. Touching injury no. 3.**
5. **Incised wound 17cm x 2cm x brain deep on left side of head. Temporal parietal and occipital bone found fractured. Bone and membrane also found cut. The injury was 1cm above the left ear.**
6. **Incised wound 10cm x 4cm x bone deep on the back of right fore-arm. Fibula bone fractured.**

7. **Incised wound 2cm x 1cm x chest cavity deep on right side of chest below 12cm of scapula bone, pleura and right chest found cut.**
8. **Incised wound 2cm x 1cm x chest cavity deep on right side of the chest 5cm below the injury no. 7. Pleura and right chest found cut.**
9. **Incised wound 5cm x 2cm x chest cavity deep. 8cm ahead of injury no. 8. Pleura and right chest found cut.**
10. **Incised wound 7cm x 2.5cm x bone deep above the left shoulder.**
11. **Incised wound 4cm x 2cm x muscle deep on the left arm.**
12. **Incised wound 2cm x .5cm x chest cavity deep. 5cm below the left nipple at 5,º clock position. Left lung and pleura found cut.**
13. **Incised wound 1cm x .5cm x cavity deep on the left side of the abdomen 13cm away from umbilicus.**
14. **Incised wound 2cm x .5cm x muscle deep on the left side of the thigh, 3cm above the knee joints.**

On internal examination, the lungs were found pale. Both the chambers of heart were empty. In the small intestine, digested food and gases were found. In large

intestine, faecal matter and gases found. Liver 1100 gms, Spleen 120 gms pale, kidney 220 gm pale. Urinary bladder empty. Duration of death was recorded to be about one day. According to the Medical Officer, cause of death was shock and haemorrhage as a result of ante-mortem injuries.

4. The Investigating Officer prepared the site plan (Exh. A-8) on the very day of the incident i.e. on 12.09.2001. He also took the blood stained soil and prepared memo (Exh. A-9). On 14.09.2001, the appellants, surrender before the Chief Judicial Magistrate, Pauri Garhwal. On 17.09.2001, Sub-Inspector Shri R.K. Kannaujia (P.W. 9), after recording the statements of the witnesses, took the appellants in the police custody and on 19.09.2001, recovered the 'KHUKARI' on pointing out of the appellants from a canal and prepared the recovery memo (Exh. A-10). On the basis of the evidence collected, the Investigating Officer submitted chargesheet (Exh. A-11), against all the three appellants for their trial regarding offence punishable under Section 302 of I.P.C. The learned Magistrate on receipt of the chargesheet, after giving necessary copies to the appellants, committed the case to the court of Sessions. Learned Sessions Judge, Pauri-Garhwal, after hearing the parties, on 07.12.200, charged all the three accused of offence punishable under Section 302 read with Section 34 of I.P.C., to which they pleaded not guilty and claimed to be tried. Thereafter prosecution got examined P.W. 1 Dabbal Singh (informant and father of the deceased), P.W. 2 Sarvendra Singh (eye witness), P.W. 3 Dr. Pradeep Kumar (Medical Officer who conducted autopsy), P.W. 4 Sharda Prasad Dhyani (declared hostile), P.W. 5 Bhagat Singh (declared

hostile), P.W. 6 Ravindra Khantwal (declared hostile), P.W. 7 Inspector Nanke Singh Janwal (who initially investigated the crime), P.W. 8 Dinesh Mohan Bharti (witness of the recovery of the KHUKHARI) and P.W. 9 Sub-Inspector R.K. Kannaujia (who completed the investigation). The entire oral as well as documentary evidence and the material exhibits were put to the appellants under Section 313 of the Cr.P.C. to which they alleged to be false. Learned Sessions Judge, after hearing the parties, found all the three appellants guilty of the charge punishable under Section 302 read with Section 34 of the I.P.C. and after hearing them on sentence, sentenced them as mentioned earlier. Aggrieved by which this appeal has been preferred.

5. We heard learned Counsel for the parties and perused the evidence on record.

6. P.W. 1 Dabbal Singh has stated that Rishi Mohan (deceased) was his son. He further states that on 12.09.2000, his son (deceased) was going from his house towards Durgapuri bazaar. This witness further states that Ravindra Khantwal (P.W. 6), informed him that appellants Appu S/o Sachidanand, Dippi S/o Heeral Lal and Deepu S/o Udai Singh have killed Rishi Mohan and thrown his body, infront of the house of Maheshanand Bhatt, Mangat Ram and Sohanlal. The witness stated that on receiving information, he rushed to the spot, where he found his son dead. P.W. 1 Dabbal Singh Negi further states that on the spot, witnesses, Sarvendra Singh (P.W. 2), Bhagat Singh (P.W. 5), met him and told him about the incident. This witness at the end of the examination in chief, states that he immediately, telephonically informed the police and also went at Police Station and

lodged the F.I.R. (Exh. A-1). In view of the distance between the place of incident and the Police Station, in the opinion of this Court, F.I.R. can be said to be a prompt one. In the cross-examination, P.W. 1 Dabbal Singh Negi has stated that the distance from his house to the place of incident is only one thousand yards. He has further stated in the cross-examination that at 1:45 P.M. his son left his house for Durgapuri, and at 2:05 P.M., he received the information from Ravindra Khantwal (P.W. 6) about the incident.

7. P.W. 2 Sarvendra Singh resident of Nandpur (village where incident has taken place) is the star eye-witness who states that he knew the deceased as well as the appellants from before the date of the incident. The witness, narrating the incident, states that on 12.09.2001 at about 2:00 P.M., he along with Bhagat Singh witnessed appellants, quarrelling with Rishi Mohan (deceased) and immediately thereafter the appellants attacked Rishi Mohan with KHUKARI. This witness further states that after committing the murder, appellants fled towards the North. In the cross-examination, this witness states that he was coming from the side of Durgapuri and he saw the incident from a distance of about 200 meters. However, he says that he does not know on what issue the appellants were quarrelling with the deceased. P.W. 2 Sarvendra Singh, however, in the cross examination, states that all the three appellants were not holding KHUKARI but it was only Appu who was armed with the weapon (KHUKARI) which had a length of appx. 12-10 inches. He further stated that only Appu attacked with KHUKARI and rest of the appellants caught hold of the deceased. The statement of P.W. 3 Dr. Pradeep Kumar corroborates the facts that the ante-

mortem injuries recorded by him in the post-mortem report (Exh. A-2) could have been caused on 12-09-2001 at about 2:00 P.M. As such in the opinion of this Court, the statement of eye-witness P.W. 2 Sarvendra Singh, not only gets corroborated from the prompt F.I.R. (Exh. A-1) but also from the medical evidence as recorded in Exh. A-2.

8. P.W. 4 Sharda Prasad Dhyani has denied having witnessed the incident. This witness was got declared hostile by the prosecution. In the cross-examination, he only admits that he came to know that Rishi Mohan (deceased) has died. P.W. 5 Bhagat Singh, another alleged eye-witness has also denied his presence at the scene of occurrence at the time of commission of crime. This witness too was got declared hostile by the prosecution, and in cross-examination, he admits that on 12.09.2001, Rishi Mohan (deceased) was murdered but he does not know who committed the crime. However, he admits that he came to know of the incident on 12.09.2001 itself. P.W. 6 Ravindra Khantwal says that he knew Rishi Mohan (deceased) but he doesn't know the appellants. He states that appellants have not committed any crime in his presence. This witness was also got declared hostile by the prosecution and in cross-examination, he denies having been colluded with the appellants.

9. P.W. 7 Shri Nanke Singh Janwar, the Inspector who initially investigated the crime has stated that on 12.09.2001 at about 2:45 P.M., First Information Report was lodged at the police station where from he proceeded with the police party to the spot and prepared the inquest report (Exh. A-2), letter to the Chief Medical Officer

(Exh. A-4), police form No. 13 (Exh. A-5), diagram of the dead body (Exh. A-6) and sample seal (Exh. A-7). This witness also states that he also prepared site plan (Exh. A-8) and after taking the blood stained soil (Exh. A-1), and prepared its Memo (Exh. A-9). P.W. 7 Nanke Singh Janwar who initially investigated the crime, further states that when the investigation was taken over by Sub-Inspector R.K. Kannaujia (P.W. 9), KHUKARI (Exh. 3) was recovered on the pointing out of the appellants and recovery memo (Exh. A-10) was prepared in his presence. P.W. 8 Dinesh Mohan Bharti is the witness who corroborates the recovery of the KHUKARI on 19.09.2001, at the instance of the appellants. P.W. 9 R.K. Kannaujia has also corroborated the recovery of KHUKARI from the canal on pointing out of the appellants. This witness has further stated that during investigation, he prepared the site plan (Exh. A-14), relating to recovery of the weapon. He further prepared recovery memo (Exh. A-15) relating to recovery of the clothes of the appellants. The Chemical Examiner's report dated 26.02.2002 which is at paper No. 23 of the record of this case, shows that on chemical examination, human blood was found in said items. As such to that extent, the chemical examiner's report also corroborates the prosecution story.

10. On behalf of the appellants, it is argued that the prosecution story is doubtful for the reason that in the broad day light there should have been many witnesses on the road to witness the crime. We do not see much force in the argument for the reason that generally public is reluctant to come forward to depose before the court. In State of U.P. Vs. Anil Singh 1989 S.C.C. (Criminal)

Pg. 48, the Apex Court has held that it is not proper to reject the prosecution version for the want of corroboration of independent witnesses, if the case is otherwise true and acceptable.

11. Shri Sandeep S. Tiwari, learned Counsel for the appellants vehemently argued that recovery of the blood stained KHUKARI after seven days of the incident from canal in un-believable and that too at the instance of all the three appellants together. To some extent, there appears force in the contention of the learned Counsel for the appellants that it is not natural that all the three appellants together would have pointed out the weapon and got it recovered in the manner, it is alleged by the prosecution. But it is the duty of the court to separate chaff from the grain. This Court has to see whether the only manner, alleged by the prosecution is doubtful or the entire recovery itself is suspicious. P.W. 8 Dinesh Mohan Bharti who is the public witness of the recovery states that KHUKARI (Exh. 3) was recovered in his presence at the instance of the appellants and recovery memo (Exh. A-10) was prepared before him. Statement of this witness, read with statement of P.W. 7 Nanke Singh Janwar and P.W. 9 R.K. Kannaujia, makes us believe that the KHUKARI (Exh. 3) was recovered by the police. However, his statement as to the fact that all the three appellants got recovered the weapon, appears to be doubtful for the reason that in the cross-examination, this witness himself admits that he reached at the place where recovery was made, after it has already been recovered by the police but Exh. A-10 was prepared at the place of recovery in his presence. In the circumstances, this Court is of the view that it cannot be said if all the three appellants got weapons recovered as

alleged by the prosecution. In Mohd. Abdul Hafeez Vs. State of A.P. AIR 1973 S.C. Pg. 367, involving more than such accused in which recovery has been deprecated.

12. But entire prosecution story as against all the appellants cannot be thrown away for the simple reason mentioned above. It is our duty to test, to what extent the evidence adduced has ring of truth and is cogent, credible and trustworthy. In Sunil Kumar Vs. State of Govt. of NCT Delhi 2004 S.C.C. (criminal) 1055, the Apex Court has held that the version as presented in the court, if substantially true against a particular accused, the prosecution evidence cannot be rejected for exaggerations or embroidery made by investigation or the witness.

13. In the circumstances, while it is the duty of the court to see that no innocent person is punished, it is equally important to wee that the person regarding whom there is clear evidence of commission of crime, such person should not be given benefit of some distortion or exaggeration, made in the prosecution story by the witnesses. P.W. 2 Sarvendra Singh in his cross examination has clarified that it was only appellant Appu who was armed with KHUKARI. This witness has further stated that it was only Appu who was giving blows with KHUKARI on the person of the deceased. Considering the above statements of the natural eye-witness, it becomes doubtful if other appellants Deepu alias Deepak or Dippi alias Vilaschand had any prior meeting of minds with Anup Singh alias Appu in commission of crime. For convicting a person under

Section 302 read with Section 34 of I.P.C., it is essential to see that such person who himself has not committed the crime, had common intention to commit the murder with the main assailant. The evidence of common intention of Deepu alias Deepak or that of Dippi alias Vilaschand cannot be said to have been proved beyond reasonable doubt regarding commission of murder of Rishi Mohan with the main assailant Anup Singh alias Appu. As such in the present case where there is no reasonable doubt in the prosecution evidence as to the commission of crime by Anup Singh alias Appu, the other two are entitled to the benefit of reasonable doubt.

14. In view of the above discussions, the appeal of the appellants Deepu alias Deepak and that of Dippi alias Vilaschand, deserves to be allowed and the appeal of the appellant Anup Singh alias Appu is liable to be dismissed. Accordingly, the impugned judgment and order to the extent of conviction of appellants Deepu alias Deepak and Dippi alias Vilaschand is set aside. They are acquitted from the charge of offence punishable under Section 302 read with Section 34 of I.P.C. They shall be released forthwith, if in jail and not wanted in connection with any other crime. However, appeal of Anup Singh alias Appu is dismissed. The impugned judgment regarding his conviction under Section 302 I.P.C. and sentence awarded to him by the trial court, is upheld.

(Prafulla C. Pant, J.) **(Irshad Hussain, J.)**

Dt: 6th May, 2005
Sweta